

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review –	)	MB Docket No. 09-182
Review of the Commission’s	)	
Broadcast Ownership Rules and Other	)	
Rules Adopted Pursuant to Section	)	
202 of the Telecommunications Act of	)	
1996	)	
	)	
Promoting Diversification of	)	MB Docket No. 07-294
Ownership in the Broadcasting	)	
Services	)	

**COMMENTS OF THE  
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

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**COMMENTS OF THE  
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone & Telecommunications Alliance (“ITTA”)<sup>1</sup> hereby submits its Comments in response to the December 22, 2011 *Notice of Proposed Rulemaking* (“NPRM”) issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceedings.<sup>2</sup>

**INTRODUCTION AND SUMMARY**

In the *NPRM*, the Commission asks for comment on a variety of issues in connection with the quadrennial review of its media ownership rules. Given that all ITTA member companies are providing video services (in addition to their voice and broadband service offerings), the media ownership rules have a significant impact on ITTA members and their

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<sup>1</sup> ITTA’s membership includes CenturyLink, Cincinnati Bell, Comporium Communications, Consolidated Communications, FairPoint Communications, Hargray Communications, HickoryTech Communications, SureWest Communications, and TDS Telecom.

<sup>2</sup> *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182, 07-294, Notice of Proposed Rulemaking, FCC 11-186 (rel. Dec. 22, 2011) (“NPRM”).

subscribers. ITTA urges the Commission to use the media ownership proceeding to address broadcaster practices that undermine competition, localism, and diversity in the media marketplace. Such practices include broadcast sharing arrangements that permit coordinated retransmission consent negotiations, multicasting arrangements that effectively permit consolidation of multiple networks in a single market, and network involvement in retransmission consent negotiations that prevents affiliates from pursuing independent negotiations with multichannel video programming distributors (“MVPDs”) and greatly exacerbates retransmission consent fee increases.

As other parties have observed, these types of arrangements “allow[] broadcasters to end run the Commission’s media ownership rules, specifically, the local television ownership rule, the dual network rule and the national television ownership rule, as well as the related attribution rules.”<sup>3</sup> By utilizing the media ownership rules to prevent the harms that arise from such practices, the Commission can ensure that media markets are competitive, that broadcast stations “respond to the unique concerns and interests of the audiences within the stations’ respective service areas,”<sup>4</sup> and that diverse viewpoints and perspectives are available to the public, thus achieving its public interest goal of promoting a broadcast marketplace that meets the needs of consumers.<sup>5</sup>

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<sup>3</sup> See letter from Mike Chappell, on behalf of the American Television Alliance, to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 09-182, 10-71 (filed Nov. 18, 2011) (“ATVA Letter”), at 2.

<sup>4</sup> *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 6 (2008).

<sup>5</sup> See *NPRM* at ¶¶ 11-17.

## **I. SHARING ARRANGEMENTS, MULTICASTING ARRANGEMENTS, AND NETWORK INTERFERENCE UNDERMINE THE COMMISSION’S COMPETITION, LOCALISM AND DIVERSITY GOALS**

The practices described herein, particularly broadcast sharing or multicasting arrangements and network demands for reverse compensation that inflate independent affiliates’ retransmission consent fees, undermine the Commission’s goals of competition, localism and diversity. From a competition standpoint, broadcasters that enter into sharing arrangements to combine station operations essentially agree not to compete with each other.<sup>6</sup> Furthermore, when a single broadcast station enters into an arrangement to transmit the programming streams of two or more of the Big Four networks, one broadcaster essentially operates multiple stations in a single market because those signals are no longer separately controlled. Thus, when there is coordination of operational activities through negotiation of retransmission consent agreements, whether by separately owned stations or a single station that multicasts multiple major network signals, it reduces marketplace competition and permits stations to charge higher fees.

When broadcasters consolidate operations through sharing arrangements, it also often leads to reductions in station staff and the diminished quality and variety of local news and community affairs coverage.<sup>7</sup> Such a result is inconsistent with the goals of the Commission’s local television ownership rules to “provide[] an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers.”<sup>8</sup>

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<sup>6</sup> Broadcaster sharing arrangements that permit collusive behavior also raise significant antitrust concerns. *See* letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 09-182, 10-71 (filed Nov. 16 2011), at 2-3.

<sup>7</sup> *See* letter from Ross J. Lieberman, on behalf of the American Cable Association, *et al.*, to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 09-182, 10-71 (filed Nov. 14, 2011), at 1.

<sup>8</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 459 (3d Cir. 2011) (citing *2006 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, Report and Order and Order on Reconsiderations, 23 FCC Rcd 2010, ¶ 97 (2008) (“*2006 Quadrennial Review Order*”)).

Similarly, when a network dictates the terms under which independent affiliates negotiate retransmission consent agreements with MVPDs by demanding a portion of retransmission consent revenues for themselves, it siphons off funds that Congress and the Commission intended to be used to enhance local stations' provision of community-oriented news and public affairs programming.<sup>9</sup> As indicated in a recent study regarding the impact of retransmission consent on the Commission's localism objectives, "a key motivating factor behind Congress' enactment of the retransmission consent provisions was to strengthen local television broadcasting, particularly in terms of broadcasters' provision of local news and public affairs programming."<sup>10</sup>

However, despite the dramatic increases in retransmission consent fees in recent years, retransmission consent payments "now seem to be going straight to the bottom line of the... networks" rather than being utilized to support local programming initiatives that are at the core of broadcasters' public interest obligations.<sup>11</sup> In fact, recent research shows that "local news and [public affairs] programming has markedly dwindled," rather than increased, over the past several years:<sup>12</sup>

A study by the FCC this year found that television stations provide on average less than 1.5 hours of local public affairs programming per week. Commercial stations that provide absolutely no local news programming are increasingly prevalent, as are stations that merely replay the local news broadcasts of other stations in their market. Additionally, financial and personnel resources devoted to local news and public affairs have dropped significantly in recent years. No matter how it's measured, broadcaster commitment to

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<sup>9</sup> See Philip Napoli, "Retransmission Consent and Broadcaster Commitment to Localism," Nov. 2011 ("Napoli Report"), attached to ATVA Letter, at 11-16.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> Philip Napoli, "TV Station Blackouts, Less Local TV News Call Into Question FCC Rules," *The Hill's Congress Blog*, Dec. 22, 2011, available at: <http://thehill.com/blogs/congress-blog/technology/200991-tv-station-blackouts-less-local-tv-news-call-into-question-fcc-rules>.

<sup>12</sup> *Id.*

localism through local news and information programming hasn't kept up with skyrocketing retransmission payments.<sup>13</sup>

Thus, notwithstanding "Congress' intentions that the [retransmission consent] provisions would enhance broadcasters' ability to serve the information needs and interests of local communities, by most measures the informational needs of these communities continue to be underserved despite the availability of significant additional revenues through retransmission consent fees, which were intended for this precise purpose."<sup>14</sup> By adopting the proposals ITTA advocates below, the Commission can properly address in the media ownership proceeding the ill effects of such anti-competitive and anti-consumer broadcast practices.

## **II. THE COMMISSION SHOULD CONCLUDE THAT BROADCAST SHARING ARRANGMENTS ENABLING JOINT NEGOTIATION OF RETRANSMISSION CONSENT CONFER AN ATTRIBUTABLE INTEREST ON THE NEGOTIATING BROADCASTER**

In the *NPRM*, the Commission seeks comment on the impact of broadcast sharing arrangements, such as local marketing agreements ("LMAs"), joint sales agreements ("JSAs"), shared services agreements ("SSAs"), and similar arrangements on retransmission consent negotiations.<sup>15</sup> It is becoming increasingly common for broadcasters to rely on such arrangements, either formally or informally, for purposes of allowing multiple competing broadcast stations in a single market to collude in the negotiation of retransmission consent rather than pursuing such negotiations independently.

ITTA has argued in the FCC's ongoing retransmission consent proceeding that the Commission should prohibit competing stations from negotiating or approving retransmission consent agreements on behalf of one another and find that such practices are a *per se* violation of

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<sup>13</sup> *Id.*

<sup>14</sup> Napoli Report at 26.

<sup>15</sup> *NPRM* at ¶ 207.

the requirement to negotiate in good faith.<sup>16</sup> In the media ownership context, the Commission should clarify that such arrangements confer an attributable interest on the negotiating broadcaster. Such arrangements circumvent the Commission's media ownership rules and result in increased costs for retransmission consent fees that reduce funds available for broadband investment and raise rates for subscribers.<sup>17</sup>

Parties have identified at least 56 instances in which Big Four affiliates (ABC, CBS, Fox, and NBC) are operating under some form of sharing arrangement.<sup>18</sup> According to the study, in at least 36 of those instances, two or more stations are participating in coordinated carriage negotiations through a single bargaining representative.<sup>19</sup> These arrangements allow a single broadcast licensee to exercise control over multiple broadcast stations in a single market in contravention of the local television ownership rule, which is intended to prevent "combinations of the top four stations" in a single market.<sup>20</sup>

The local television ownership rule prohibits mergers between two of the top-four rated stations in a local market, subject to certain exceptions.<sup>21</sup> The Commission has determined that

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<sup>16</sup> See Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), the National Telecommunications Cooperative Association, ITTA, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (filed May 27, 2011) ("ITTA, *et al.* Comments"), at 9-12; *see also* letter from Stephen Pastorkovich, OPASTCO, to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 10-71, 11-128, 11-93, GN Docket No. 11-121 (filed Oct. 21, 2011).

<sup>17</sup> Available evidence suggests that common control or ownership of multiple Big Four affiliates in a single market results in an increase in broadcast carriage fees by at least 21.6%. *See Mediacom Communications Corp. v. Sinclair Broadcast Group*, Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR No. 8233-C, 8234-M (filed Dec. 14, 2009), at 5.

<sup>18</sup> See Comments of the American Cable Association, MB Docket No. 10-71 (filed May 27, 2011) ("ACA Comments"), at 7.

<sup>19</sup> *Id.*

<sup>20</sup> 2006 *Quadrennial Review Order* at ¶ 102.

<sup>21</sup> 47 C.F.R. § 73.3555(b).



such mergers would be “deleterious to competition,”<sup>22</sup> because they would “result in a single firm obtaining significantly larger market share than other firms in the market and would reduce incentive for local stations to improve programming that appeals to mass audiences.”<sup>23</sup> Thus, the Commission has tentatively concluded in the *NPRM* that the top-four prohibition continues to be necessary to promote competition.<sup>24</sup> ITTA agrees with this conclusion and also urges the Commission to take the additional step of concluding that an attributable interest exists when separately owned stations in the same market engage in the coordinated negotiation of retransmission consent, whether formally or informally, because such practices result in the same harms to competition, localism, and diversity as a merger between two top-four stations.

### **III. THE COMMISSION SHOULD CONCLUDE THAT THE EXERCISE OF RETRANSMISSION CONSENT ON BEHALF OF MULTIPLE TELEVISION SIGNALS IN A SINGLE MARKET VIOLATES THE MEDIA OWNERSHIP RULES**

The Commission also seeks comment on broadcasters’ practice of affiliating with two or more national networks to multicast multiple streams of Big Four network programming in a single market.<sup>25</sup> It is becoming increasingly common for broadcasters to circumvent the media ownership rules through such arrangements. Parties have identified at least 25 instances of common ownership of multiple Big Four affiliates in the same market.<sup>26</sup>

Like sharing arrangements, multicasting arrangements contravene the letter and spirit of the local television ownership rules by allowing a single entity to exercise control over multiple network affiliates within a single market. In addition, these arrangements “allow stations to do

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<sup>22</sup> 2006 *Quadrennial Review Order* at ¶ 102.

<sup>23</sup> *NPRM* at ¶ 40.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶¶ 56-59.

<sup>26</sup> See Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010), at Appendix C.

locally what the networks are forbidden from doing nationally [under the dual network rule]: consolidate multiple Big Four signals under the control of a single entity.”<sup>27</sup>

The Commission’s dual network rule seeks to prevent harms to competition and localism by prohibiting a merger between two or more of the Big Four national broadcasting networks.<sup>28</sup> In light of “the level of vertical integration of each of the top four networks, as well as their continued operation as a ‘strategic group’ in the national advertising market,” the Commission has concluded that a merger of any of the top four networks would result in competitive harms that “would reduce program output, choices, quality, and innovation to the detriment of viewers.”<sup>29</sup> The Commission also has determined that a top-four merger “would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates’ influence on network programming, and thus harming the ability of the affiliates to serve their communities.”<sup>30</sup>

In the *NPRM*, the Commission has tentatively concluded that the dual network rule continues to be necessary to promote competition and localism.<sup>31</sup> ITTA agrees with this assessment and urges the Commission to ensure that broadcasters cannot evade the purpose of the dual network rule by affiliating with two or more Big Four networks in a single market. ITTA also submits that the Commission should revise its local television ownership rule to prohibit the ownership, operation, or control of two television station signals (as opposed to stations) in a single market unless an exception to the rule is applicable.<sup>32</sup>

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<sup>27</sup> ATVA Letter at 3.

<sup>28</sup> 47 C.F.R. §73.658(g).

<sup>29</sup> *NPRM* at ¶ 136.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 137.

<sup>32</sup> *See* 47 C.F.R. § 73.3555(b)(1).

#### IV. THE COMMISSON SHOULD PROHIBIT NETWORK INTERFERENCE IN INDEPENDENT AFFILIATES' RETRANSMISSION CONSENT NEGOTIATIONS

The Commission also should address the related issue of network interference in affiliates' retransmission consent negotiations. Increasingly, networks are demanding a growing percentage of retransmission consent fees and the right to approve retransmission consent agreements between independent affiliates and MVPDs.

ITTA has argued in the retransmission consent docket that the Commission should determine that it is a *per se* violation for a network to interfere in retransmission consent negotiations by requiring approval rights with respect to a retransmission consent agreement for a network with which it is affiliated.<sup>33</sup> In the media ownership proceeding, the Commission should prevent such intrusive behavior by concluding that a network's exercise of a veto or approval rights with respect to an independent affiliate's retransmission consent agreement constitutes a *de facto* transfer of control of the station's license in violation of Section 310(d) of the Act and the station's public interest obligations under Section 309.<sup>34</sup> In addition, the Commission should conclude that a veto or right-of-approval provision gives the network an attributable interest in each of its affiliated stations, as such a provision confers a degree of "influence or control such that the [network has] a realistic potential to affect the programming decisions of licensees or other core operating functions."<sup>35</sup>

According to industry analysts, "sharing in affiliates' retrans revenue stream is now a given" for major networks, with networks expecting "to receive at least half of the income

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<sup>33</sup> ITTA, *et al.* Comments at 9-11.

<sup>34</sup> 47 U.S.C. §§ 310(d), 309.

<sup>35</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, ¶ 1 (1999), *recon. granted in part*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097 (2001), *stayed*, Order, 16 FCC Rcd 22310 (2001).

flowing to affiliates.”<sup>36</sup> By demanding a significant cut of affiliates’ retransmission consent revenue through reverse compensation, “the major broadcast networks... have tapped a major new revenue stream that will grow from \$146 million [in 2011] to \$1.3 billion in 2015.”<sup>37</sup> When added to the amount expected through direct payments from network owned and operated stations, the total retransmission consent-related revenue for the major networks will reach an estimated \$3 billion in 2015.<sup>38</sup> Analysts “expect[] that broadcasters will simply double their fees from distributors to make up the difference” in responding to such demands.<sup>39</sup>

Network interference in affiliate negotiations extends beyond directly influencing the financial terms of retransmission consent agreements when the network has the right to approve, veto, or place restrictions on such agreements. In these situations, the affiliate essentially cedes control over negotiations to the network, which prevents any meaningful negotiation for carriage of the affected signal between the station and the MVPD. For instance, when ITTA member companies have requested additional functionalities as a way to justify increased retransmission consent fees (e.g., the ability to stream secured content to third party devices in the customer’s home, archive content in centralized storage locations for the provision of new authenticated services, or provide a network-based DVR service rather than one hosted in the set-top box),

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<sup>36</sup> Harry A. Jessell, “SNL Kagan: Reverse Comp to Hit \$1.3B in ’15,” *TVNewsCheck*, Nov. 1, 2011, *available at*: <http://www.tvnewscheck.com/article/2011/11/01/55125/snl-kagan-reverse-comp-to-hit-13b-in-15>.

<sup>37</sup> *Id.* For example, News Corp., which owns Fox broadcast network and TV stations, recently reported “a 100 percent jump in the retransmission-consent fees it collects from cable and satellite affiliates that carry its TV stations.” “News Corp. Reports 100% Increase in Retransmission-Consent Fees,” *FierceCable*, Feb. 9, 2012, *available at*: <http://www.fiercecable.com/story/news-corp-reports-100-increase-retransmission-consent-fees/2012-02-09>.

<sup>38</sup> *Id.*

<sup>39</sup> “Broadcasters Feel Squeeze – and Will Hike Fees; Moody’s Analyst Sees Retrans Bills Rising Three-Fold by 2017,” *Multichannel News*, Dec. 5, 2011, *available at*: [http://www.multichannel.com/article/477453-Broadcasters\\_Feel\\_Squeeze\\_and\\_Will\\_Hike\\_Fees.php](http://www.multichannel.com/article/477453-Broadcasters_Feel_Squeeze_and_Will_Hike_Fees.php).

stations typically have denied such requests due to network restrictions on their ability to agree to such terms.

The major networks have “also expressed a desire to negotiate retransmission consent agreements for [their] affiliates.”<sup>40</sup> NBC, for example, is in the process of discussions that “would allow it to negotiate by proxy for every affiliate in the country in exchange for keeping a cut of the fees stations would collect from cable and satellite providers.”<sup>41</sup> The decision to usurp control over its affiliates’ retransmission consent negotiations is purely driven by a profit motive. As stated by the chairman of NBC Broadcasting, Ted Harbert: “We believe that, with scale, we can maximize revenue” through such negotiations.<sup>42</sup>

However, such practices run afoul of the Commission’s national television ownership rule and the public interest standards that serve as the foundation of the Commission’s media ownership rules. The national television ownership rule prohibits one entity from owning stations that, in the aggregate, reach more than 39% of the country’s households.<sup>43</sup> Although this rule is not included in the scope of the Commission’s quadrennial review, it certainly comes into play in instances of network interference where a station relinquishes its rights and obligations, including retransmission consent negotiations, to the broadcast network with which it is affiliated. The Commission’s public interest obligations require broadcast stations to maintain control over their licenses, including control over finances, programming, and personnel.<sup>44</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> “Harbert: NBC Still Working on ‘Complicated’ Proxy Retransmission Deal with Affiliates,” *FierceCable*, Jan. 24, 2012, available at: <http://www.fiercecable.com/story/harbert-nbc-still-working-complicated-proxy-retransmission-deal-affiliates/2012-01-24>.

<sup>42</sup> Kevin Downey, “Retrans Top of Mind for NBCU’s Harbert,” *TVNewsCheck*, Jan. 23, 2012, available at: <http://www.tvnewscheck.com/article/2012/01/23/56942/retrans-top-of-mind-for-nbcus-harbert>.

<sup>43</sup> 47 C.F.R. § 73.3555(e).

<sup>44</sup> 47 U.S.C. § 309.

Thus, the Commission should find that an arrangement whereby the network can restrict or withhold approval of a retransmission consent agreement entered into by an affiliate effectively transfers control over the station to the network in violation of Section 310(d) of the Act.<sup>45</sup> In addition, the Commission should determine that a veto or right-of-approval provision gives the network an attributable interest in the affected stations in violation of the national ownership cap.

### CONCLUSION

For the reasons provided above, ITTA respectfully requests that the Commission adopt its recommendations with respect to the Commission's quadrennial review of its media ownership rules.

Respectfully submitted,

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<sup>45</sup> *Id.* at § 310(d).